



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Chapter 2

[Docket DARS-2019-0058]

RIN 0750-AK73

**Defense Federal Acquisition Regulation Supplement; Appendix A,
Armed Services Board of Contract Appeals, Part 1-Charter**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing the updated Charter of the Armed Services Board of Contract Appeals (ASBCA), dated May 23, 2019. The ASBCA is chartered to serve as the authorized representative of the Secretary of Defense and the Secretaries of the Army, Navy, and Air Force in hearing, considering, and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities regarding claims on contracts under the Contract Disputes Act of 1978 or other remedy-granting provisions.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Hawes, Defense Acquisition Regulations System, OUSD(A&S)DPC(DARS), 3060 Defense

Pentagon, Room 3B941, Washington, DC 20301-3060, Telephone 571-372-6115.

SUPPLEMENTARY INFORMATION:

I. Background

This publication of Appendix A of the Defense Federal Acquisition Regulation Supplement (DFARS) updates the Charter of the ASBCA from the most recent prior version, dated April 9, 2018, to its latest version, dated May 23, 2019. The updated Charter revises paragraph 2 to reflect that appointment of ASBCA members and designation of the Chairman and Vice Chairmen of the ASBCA shall now be made by the Secretary of Defense, rather than by the Under Secretary of Defense responsible for acquisition, the General Counsel of the Department of Defense, and the Assistant Secretaries of the Military Departments responsible for acquisition.

II. Publication of This Final Rule for Public Comment Is Not Required by Statute

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is the Office of Federal Procurement Policy statute (codified at title 41 of the United States Code). Specifically, 41 U.S.C 1707(a)(1) requires that a procurement policy, regulation, procedure or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds,

and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. This final rule only publishes the updated ASBCA charter and is therefore not required to be published for public comment, because the rule does not have a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure or form.

III. Executive Orders 12866 and 13563

Executive Order (E.O.) 12866, Regulatory Planning and Review; and E.O. 13563, Improving Regulation and Regulatory Review, direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b). This rule is not a major rule as defined at 5 U.S.C. 804(2).

IV. Executive Order 13771

This rule is not an E.O. 13771 regulatory action, because this rule concerns regulations related to agency organization, management, or personnel.

III. Regulatory Flexibility Act

Because a notice of proposed rulemaking and an opportunity for public comment are not required to be given for this rule under 41 U.S.C. 1707(a)(1) (see section II of this preamble), the analytical requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.) are not applicable. Accordingly, no regulatory flexibility analysis is required and none has been prepared.

V. Paperwork Reduction Act

This rule does not impose any new information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

List of Subjects in 48 CFR Appendix A

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer, Defense Acquisition Regulations System.

Therefore, DoD is amending 48 CFR Appendix A to Chapter 2 as follows:

APPENDIX A to CHAPTER 2—ARMED SERVICES BOARD OF CONTRACT APPEALS

1. The authority citation for Appendix A to Chapter 2 is revised to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Appendix A to chapter 2 is amended by revising the introductory text and Part 1-Charter, to read as follows:

Appendix A to Chapter 2-Armed Services Board of Contract Appeals

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Armed Services Board of Contract Appeals

Approved 1 May 1962

Revised 1 May 1969

Revised 1 September 1973

Revised 1 July 1979

Revised 14 May 2007

Revised 9 April 2018

Revised 23 May 2019

Part 1-Charter

1. There is created the Armed Services Board of Contract Appeals which is hereby designated as the authorized representative of the Secretary of Defense, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force, in hearing, considering and determining appeals by contractors from decisions of contracting officers or their authorized representatives or other authorities on disputed questions. These

appeals may be taken (a) pursuant to the Contract Disputes Act of 1978 (41 U.S.C. Sections 7101-7109), (b) pursuant to the provisions of contracts requiring the decision by the Secretary of Defense or by a Secretary of a Military Department or their duly authorized representative, or (c) pursuant to the provisions of any directive whereby the Secretary of Defense or the Secretary of a Military Department or their authorized representative has granted a right of appeal not contained in the contract on any matter consistent with the contract appeals procedure. The Board may determine contract disputes for other departments and agencies by agreement as permitted by law. The Board shall operate under general policies established or approved by the Under Secretary of Defense responsible for acquisition and may perform other duties as directed not inconsistent with the Contract Disputes Act of 1978. The Board shall decide the matters before it independently.

2. Membership of the Board shall consist of attorneys at law who have been qualified in the manner prescribed by the Contract Disputes Act of 1978. Appointment of Board members shall be made by the Secretary of Defense. Members of the Board are hereby designated Administrative Judges. There shall be designated from among the appointed Judges of the Board a Chairman and two or more Vice Chairmen. Designation of the Chairman and Vice Chairmen shall be made by the Secretary of Defense, of nominees from Judges of the Board recommended by the Under Secretary of Defense responsible for

acquisition, in coordination with the General Counsel of the Department of Defense, and the Assistant Secretaries of the Military Departments responsible for acquisition. When there is a vacancy, the incumbent is unavailable, or for appropriate Board administrative reasons, the Under Secretary of Defense responsible for acquisition or the Chairman may designate a Judge of the Board to serve as an Acting Chairman or Acting Vice Chairman.

3. The Chairman of the Board shall be responsible for establishing appropriate divisions of the Board to provide for the most effective and expeditious handling of appeals. The Chairman shall have authority to establish procedures for the issuance of Board decisions. The Chairman may refer an appeal of unusual difficulty, significant precedential importance, or serious dispute within the normal decision process for decision by a Senior Deciding Group established by the Chairman which shall have the authority to overturn prior Board precedent.

4. It shall be the duty and obligation of the Judges of the Armed Services Board of Contract Appeals to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with applicable contract provisions and in accordance with law and regulation pertinent thereto.

5. Any Judge of the Board or any examiner, designated by the Chairman, shall be authorized to hold hearings, examine witnesses, and receive evidence and argument. A Judge of the Board shall have

authority to administer oaths and issue subpoenas as specified in the Contract Disputes Act of 1978. In cases of contumacy or refusal to obey a subpoena, the Chairman may request orders of the court in the manner prescribed in the Contract Disputes Act of 1978.

6. The Board shall have all powers necessary and incident to the proper performance of its duties. The Board has the authority to issue methods of procedure and rules and regulations for its conduct and for the preparation and presentation of appeals and issuance of opinions.

7. The Chairman shall be responsible for the internal organization of the Board and for its administration. The Chairman shall provide within approved ceilings for the staffing of the Board with non-Judge personnel, including hearing examiners, as may be required for the performance of the functions of the Board. The Chairman shall appoint a Recorder of the Board. All personnel shall be responsible to and shall function under the direction, supervision and control of the Chairman.

8. The Board will be serviced by the Department of the Army for administrative support as required for its operations. Administrative support will include budgeting, funding, fiscal control, manpower control and utilization, personnel administration, security administration, supplies, and other administrative services. The Departments of the Army, Navy, Air

Force and the Office of the Secretary of Defense will participate in financing the Board's operations on an equal basis and to the extent determined by the Under Secretary of Defense (Comptroller). The cost of processing appeals for departments and agencies other than those in the Department of Defense will be reimbursed.

9. Within 30 days following the close of a fiscal year, the Chairman shall forward a report of the Board's transactions and proceedings for the preceding fiscal year to the Under Secretary of Defense responsible for acquisition, the General Counsel of the Department of Defense, and the Assistant Secretaries of the Military Departments responsible for acquisition.

10. The Board shall have a seal bearing the following inscription: "Armed Services Board of Contract Appeals." This seal shall be affixed to all authentications of copies of records and to such other instruments as the Board may determine.

11. This revised charter is effective upon the date of the signature of the Secretary of Defense.

Approved:

(signed) Patrick M. Shanahan (23 May 2019),

Acting Secretary of Defense.

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